



APPENDIX

SUPREME COURT, NEW YORK COUNTY—SPECIAL TERM,
PART III

Decided by Mr. Justice Levy, March 9, 1942.
Reported New York Law Journal March 10, 1942,
p. 1040

Emmerich v. Central Hanover Bank & Trust Co.—This is a motion to dismiss the first, second and third causes of action for alleged insufficiency, and also to dismiss the second and third causes of action on the ground that the statute of limitations has run against them.

Each of the three causes whose sufficiency is assailed fails to state a good cause of action for lack of an allegation that plaintiff was a bondholder at the time of the breaches of trust charged to the defendant. In *Elkind v. Chase Nat. Bank* (259 App. Div. 661, aff'd 284 N. Y., 726) the Appellate Division of this department held not only that no representative action was maintainable for injury to the bondholders as a class, but also that the plaintiffs did not even possess individual causes of action (p. 666): "These plaintiffs have not individual causes of action for the alleged breaches of fiduciary duty since it is admitted in the stipulation of facts that they did not purchase their bonds until October, 1936, long after all the breaches alleged in the complaint had occurred. A trustee cannot, before the relationship is established, have violated a trust duty."

In *Hendry v. Title Guar. & Trust Co.* (255 App. Div. 497), a similar holding was made as to plaintiffs who held participation certificates in a bond and mortgage. The attempt of plaintiff to distinguish the instant case on the basis of the fact that the bonds here involved are bearer bonds which were to be equally and ratably secured by the trust indenture regardless of time of issue or negotiation is without merit. The provision that all the bonds were to be equally secured has nothing whatsoever to do with the question of whether a bondholder may recover for breaches of trust committed by the trustee at a time when someone else owned the bonds. That provision is the usual one to be found in trust indentures and was undoubtedly present in *Elkind v. Chase National Bank* (*supra*). Nor may plaintiff

derive any comfort from the fact that a stockholder may maintain a derivative action on behalf of his corporation to recover for wrongs occurring prior to the acquisition of his stock (*Pollitz v. Gould*, 202 N. Y. 11). The rationale of the decision in *Pollitz v. Gould* (*supra*) was that a derivative stockholder's action is commenced for the benefit of the corporation and not for the individual benefit of the stockholder. The right of action which the stockholder enforces on behalf of the corporation is among the corporate assets in which he acquires an interest by purchasing shares of stock. No such reasoning may be applied to a suit by a bondholder for breaches of trust occurring at a time when he owned no bonds. Conceivably, the person or persons who owned the plaintiff's bonds at the time the breaches of trust were committed may have obtained satisfaction for the breaches or may have waived them. At any rate, this court is constrained by the decision of the Appellate Division in *Elkind v. Chase National Bank* (*supra*) to hold that the plaintiff may not recover for breaches of trust committed prior to his acquisition of the bonds now held by him in the absence of an assignment to him of the causes of action for breach of trust. *Matter of 24-54 Forty-fourth Street, Long Island City* (176 Misc. 249) cited by plaintiff, has no application here. That case involved the right of a certificate holder to enforce a guaranty rather than his right to recover for a breach of trust occurring prior to the acquisition of the certificate.

There being no allegation in any of the causes of action that plaintiff was a bondholder at the time the alleged breaches of trust were committed, and there being no averment that the causes of action for breach of trust had been assigned to plaintiff by those who owned the bonds, at the time the breaches were committed, the motion to dismiss the causes of action for insufficiency is granted, with leave to serve an amended complaint within ten days from the service of a copy of this order, with notice of entry. In view of this disposition it becomes unnecessary at this time to decide whether the second and third causes of action are barred by the statute of limitations. The motion is denied, without prejudice to the extent that it seeks the dismissal of those causes of action on the basis of that statute.

Order signed.

